

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SAMUEL MONTERO,

Plaintiff,

-against-

CAPT. WILLIMS, CORRECTION OFFICER, WORK AT
A.M.K.C. FACILITY – C95 HOURS 3/11 PM IN
INTAKE, OFFICER THOMPSON, CORRECTIONAL
OFFICER, WORK AT A.M.K.C. FACILITY – C95
HOURS 3/11 PM IN INTAKE, THE DEPARTMENT OF
CORRECTION N.Y.C.,

Defendants.

**AMENDED ANSWER TO
THE COMPLAINT ON
BEHALF OF DOC AND
ANSWER ON BEHALF OF
CAPTAIN M. WILLIAMS**

08 CV 2819 (LTS)(MHD)

Jury Trial Demanded

Defendants New York City Department of Correction (“DOC”) and Captain M. Williams, by their attorney, Michael A. Cardozo, Corporation Counsel of the City of New York, for their answer to the complaint, respectfully allege, upon information and belief, as follows:¹

1. Deny the allegations set forth in paragraph “I” of the complaint and all of its subparts, except admit that plaintiff purports to name the parties as stated therein.
2. Deny the allegations set forth in paragraph “II.A.” of the complaint, except admit that plaintiff was incarcerated at Rikers Island on or about November 15, 2007.
3. Deny the allegations set forth in paragraph “II.B.” of the complaint, except admit that plaintiff was present in “Mod 1 Lower” on or about November 15, 2007.

¹ In addition to defendants DOC and Captain M. Williams, the complaint purports to name “Officer Thompson” as a defendant. However, on information and belief, Correction Officer Thompson has not been served with a copy of the summons and complaint and this answer is therefore not submitted on behalf of Correction Officer Thompson.

4. Deny the allegations set forth in paragraph "II.C." of the complaint, except admit that an incident involving plaintiff occurred on or about November 15, 2007 at approximately 6:45 p.m.

5. Deny the allegations set forth in paragraph "II.D." of the complaint, except deny knowledge or information sufficient to form a belief as to the allegations that the incident was caught on camera and that other inmates witnessed the incident.

6. In response to the two-page document dated November 18, 2007 attached to the complaint, defendants deny the allegations contained therein, except admit that there was a fight between inmates on November 15, 2007.

7. Deny the allegations set forth in paragraph "III" of the complaint, except admit that plaintiff visited the clinic on or about November 15, 2007, and deny knowledge or information sufficient to form a belief as to the truth of the allegation that a photograph was taken of plaintiff.

8. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "IV" of the complaint and all of its subparts, except admit that plaintiff was incarcerated at Rikers Island on or about November 15, 2007, and that there is a grievance procedure at Rikers Island.

9. Deny the allegations set forth in paragraph "V" of the complaint, except admit that plaintiff purports to seek relief as stated therein.

10. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "VI" of the complaint and all of its subparts.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE:

11. The complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE:

12. At all times relevant to the acts alleged in the complaint, defendants acted reasonably in the proper and lawful exercise of their discretion.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE:

13. Captain M. Williams has not violated any clearly established constitutional or statutory right of which a reasonable person would have known and therefore is protected by qualified immunity.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE:

14. Any injury alleged to have been sustained resulted from plaintiff's own culpable or negligent conduct and/or the intervening conduct of third parties and was not the proximate result of any act of the defendant.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE:

15. Plaintiff's claims may be barred, in whole or in part, by his failure to exhaust his administrative remedies as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE:

16. Plaintiff's claims may be barred, in whole or in part, because plaintiff failed to comply with all conditions precedent to suit.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE:

17. Plaintiff's claims may be barred, in whole or in part, by the doctrines of res judicata and/or collateral estoppel.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE:

18. Plaintiff's claims may be barred, in whole or in part, by the applicable statute of limitations period.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE:

19. Plaintiff provoked any incident.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE:

20. Defendants have not violated any rights, privileges or immunities secured to plaintiff by the Constitution or laws of the United States or the State of New York or any political subdivision thereof, nor have defendants violated any act of Congress providing for the protection of civil rights.

AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE:

21. DOC is not a suable entity.

AS AND FOR AN TWELFTH AFFIRMATIVE DEFENSE:

22. Captain M. Williams had no personal involvement in the incident alleged in the complaint.

WHEREFORE, defendants DOC and Captain M. Williams request judgment dismissing the complaint in its entirety, together with the costs and disbursements of this action, and such other and further relief as the Court may deem just and proper.

Dated: New York, New York
 September 5, 2008

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for Defendants DOC and Williams
100 Church Street
New York, New York 10007
(212) 788-1575

By: _____
 /s/
 Bradford C. Patrick
 Assistant Corporation Counsel
 Special Federal Litigation Division

To: BY MAIL
 Samuel Montero, [REDACTED]
 Plaintiff Pro Se
 George R. Vierno Center
 09-09 Hazen St.
 E. Elmhurst, NY 11370

DECLARATION OF SERVICE BY FIRST CLASS MAIL

I, Mary O'Flynn declare, pursuant to 28 U.S.C. § 1746, under the penalty of perjury that on **September 5, 2008** I served the annexed **Amended Answer to the Complaint on Behalf of DOC and Answer on Behalf of Captain Williams** upon the following individual by depositing a copy of the same, enclosed in a first class postpaid properly addressed wrapper, in a post office/official depository under the exclusive care and custody of the United States Postal Service, within the State of New York, directed to the said plaintiff pro se at the address set forth herein, being the address designated by said plaintiff for that purpose, to wit:

Samuel Montero, # [REDACTED]
Plaintiff Pro Se
George R. Vierno Center
09-09 Hazen St.
E. Elmhurst, NY 11370

Dated: New York, NY
 September 5, 2008

/s/
Mary O'Flynn
Assistant Corporation Counsel
Special Federal Litigation

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ON BEHALF OF DOC AND ANSWER ON
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MICHAEL A. CARDOZO

*Corporation Counsel of the City of New York
Attorney for Defendants DOC and Williams
100 Church Street
New York, N.Y. 10007*

*Of Counsel: Bradford C. Patrick
Tel: (212) 788-1575
NYCLIS No.2008-021734*

Due and timely service is hereby admitted.

New York, N.Y., 200.....

..... Esq.

Attorney for.....